Supreme Court, U.S.
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No.

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROY L. ODEKIRK,
Petitioner,
v.

IMPERIAL PALACE, INC. V.E.B.A. TRUST EMPLOYEE MEDICAL BENEFIT PLAN; IMPERIAL PALACE, INC. V.E.B.A. TRUST AND RALPH ENGELSTAD, AS TRUSTEE; PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN A. HUNT, ESQ.
RALEIGH, HUNT & McGARRY, P.C.
302 E. Carson Ave., #1102
Las Vegas, NV 89101
Telephone: (702) 386-4842

Counsel of Record for Petitioner

21 pp

QUESTION PRESENTED

1. Should the "Doctrine of Reasonable Expectations", recently adopted by the Ninth Circuit to apply to ERISA-governed insurance contracts, have been applied in the action below when application of the Doctrine was argued by Petitioner but not considered by the Ninth Circuit?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reprinted in the Appendix at 1a. The order of the District Court for the District of Nevada is reprinted in the Appendix at 4a.

JURISDICTION

The Ninth Circuit entered judgment on September 2, 1994 reversing the District Court judgment. This Court has jurisdiction under 28 U.S.C. § 1254 (1) to review the judgment of the Ninth Circuit.

STATEMENT OF THE CASE

In October of 1988, Petitioner Roy L. Odekirk ("Odekirk"), became employed by the Imperial Palace Hotel and Casino ("I.P."). The I.P. offers its eligible employees medical benefits through Respondent Imperial Palace, Inc. V.E.B.A. Trust Employee Medical Benefit Plan ("Plan"). The Plan is an employee welfare benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132 (a) (1) (B). The Plan is administered and self funded by Respondent Imperial Palace V.E.B.A. Trust (the "Plan Administrator"), with a maximum lifetime benefit of $1,000,000.00 for all covered expenses. The Plan Administrator, however, has entered into a deductible Per Covered Unit Stop Loss Agreement with Respondent Provident Life and Accident Insurance Company ("Provident"), which provides for a maximum reimbursement of $950,000.00 after the Plan Administrator has paid the deductible amount of $50,000.00 for covered expense under the Plan.

Odekirk was eligible under the Plan for such medical expenses that were included in the "Covered Expense" provisions of the Plan.

On August 3, 1989, Odekirk was hired to take pictures

of recently installed pool decking at the Las Vegas Hilton for $50.00 per hour. While performing the two hour, free-lance job unrelated to his work at I.P., Odekirk climbed atop a mobile work platform. The platform, as it was being pushed on the ground, toppled throwing Odekirk onto a concrete bench and rendering him a paraplegic. As a result, Odekirk incurred medical bills in excess of $200,000.00.

The Plan Administrator denied Odekirk's claim for the expenses stemming from the fall, citing a clause in the Plan that excludes from coverage "Expense for a work related illness." (App.10a, 11a). Work related illness is defined elsewhere in the Plan as "an illness which arises from or is sustained in the course of work for pay, profit, or gain." (App.9a). Illness is separately defined in the Plan to include "bodily injury." (App.8a).

On January 24, 1991 Odekirk filed action against Respondents in state court alleging Respondents erroneously interpreted the Plan provision to exclude Odekirk's claim for coverage. Respondents removed the suit to federal court pursuant to 28 U.S.C. § 1441.

Cross motions for summary judgment followed. The District Court subsequently granted Odekirk's motion and denied the Respondents' cross motion after determining the exclusionary language was ambiguous, unreasonable and void as against public policy, as interpreted by the Respondents. (App. 6a, 7a).

On appeal, Respondent argued the District Court applied the wrong standard of review and the Plan exclusion was unambiguous. Odekirk countered Respondents' arguments and alternatively argued that even if the exclusion clause was found to be unambiguous, it was still unenforceable based upon the Doctrine of Reasonable Expectations.

On September 2, 1994 the Ninth Circuit reversed the District Court's judgment. The Ninth Circuit held the exclusion provision to be unambiguous. The Ninth circuit reasoned "[the] language of the plan was explicit enough to put an insured layperson on notice that he loses coverage when he performs

outside work for pay." (App. 2a). Based upon the lack of ambiguity, the Ninth Circuit declined to consider whether the District Court applied the appropriate standard of review. (App. 3a).

REASONS FOR GRANTING THE WRIT

In light of new case law recently handed down by the Ninth Circuit in *Saltarelli v. The Bob Baker Group Medical Trust.* 35 F.3d 382, 63 USLW 2244 (9th Cir. 1994), this petition presents an appropriate question for this Court's action. The Ninth Circuit failed to consider the recently adopted "Doctrine of Reasonable Expectations" even though its application was argued by Odekirk.

On August 31, 1994 the Ninth Circuit adopted "the doctrine of reasonable expectations as a principle of the uniform federal common law informing interpretation of ERISA-governed insurance contracts." *Saltarelli,* 35 F.3d at 387. Prior to August 31, 1994, the Ninth Circuit received the briefs and entertained oral argument in the instant matter. In his brief, Odekirk argued that even if the Ninth Circuit determined the Plans occupational injury exclusion unambiguously excluded Odekirk from coverage, the exclusion was unenforceable against the petitioner based upon the Doctrine of Reasonable Expectations. At the time Odekirk submitted his argument to the Ninth Circuit, the Doctrine had never been addressed by the Court of Appeals.

The Ninth Circuit's failure to apply the Doctrine to the case below and subsequent adoption of the Doctrine unfairly and unjustly deprived Odekirk of an avenue for success.

Respondents may attempt to argue the Ninth Circuit's neglect was harmless because the Doctrine is merely a rule of construction and thus, is only applied as a test for resolving ambiguities in contracts. Respondents may argue further, the Doctrine was not applicable because no ambiguity was found.

To the contrary, the Doctrine of Reasonable Expectations

"is not merely a rule of construction and may be applied even where there is no ambiguity." Roger C. Henderson, *The Doctrine of Reasonable Expectations and Insurance Law After Two Decades*, 51 Ohio St. L.J. 823 (1990). Moreover, the Ninth Circuit has recently applied the Doctrine in the absence of ambiguous policy language. See *Saltarelli, supra* and *State Farm Mutual Automobile Insurance Company vs. Betty Falness*, —F.3d—, 1994 WL 596451, 94 Daily Journal D.A.R. 15492 (9th Cir. 1994).

Odekirk would have been successful in the court below under the reasonable expectations doctrine. There was an objective basis for Odekirk's belief the Plan would cover an injury that occurred while he was "moonlighting" as a photographer. The exclusion itself is for "Expense for a work related illness." (App.10a) To the layman an illness is a sickness. ERISA plan terms are to be interpreted "in an ordinary and popular sense as would a [person] of average intelligence and experience. "*Allstate Insurance Co. v. Ellison*, 757 F.2d 1042, 1044 (9th Cir. 1985), cited in *Evans v. Safeco Life Ins. Co.*, 916 1437 (9th Cir. 1990). To truly understand the exclusion, it requires a coordinated reading of two separate definitions: those for "illness" and "work related illness", found on pages 8 and 10 of the policy as opposed to page 42 where the exclusion language is located. The plan exclusion can only be understood after the kind of painstaking study a reasonable insured would not be expected to undertake.

Likewise, the circumstances surrounding the acquisition and issuance of the insurance policy affirms Odekirk's reasonable expectations of coverage. Because the exclusion in question is part of a group policy provided as a benefit of employment with Respondent, and workmen's compensations covers injuries arising out of that employment, it is reasonable for Odekirk to surmise the exclusion refers to work done on behalf of the Respondent, not other work yielding remuneration.

CONCLUSION

Based upon the recent ruling by the Ninth Circuit in *Saltarelli, supra*, which adopted the Doctrine of Reasonable Expectations, Odekirk submits the petition for writ of certiorari should be granted.

Respectfully submitted,

John A. Hunt, ESQ.
Raleigh, Hunt & McGarry, P.C.
302 E. Carson Ave., #1102
Las Vegas, NV 89101
Telephone: (702) 386-4842

Counsel of Record for Petitioner

APPENDIX

Not for Publication
United States Court of Appeals
For the Ninth Circuit

Imperial Palace, Inc. V.E.B.A. Trust Employee Medical Benefit Plan; Imperial Palace, Inc., V.E.B.A. Trust and Ralph Engelstad as Trustee; Provident Life and Accident Insurance Company,	)	**FILED** SEP 02 1994 CATHY A. CATTERSON, CLERK U.S.COURT OF APPEALS
Defendants-Appellants,	)	No. 93-15229 No. CV 91-00118-LOG
v.	)	**MEMORANDUM***
Roy L. Odekirk,	)	
Plaintiff-Appellee.	)	

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding
Argued and Submitted August 12, 1994
San Francisco, California

Before: NORRIS, THOMPSON, and TROTT, CIRCUIT JUDGES

Roy Odekirk was employed by Imperial Palace and covered under its employee benefit plan ("the Plan"). While performing a two-hour freelance job not related to his work at Imperial, Odekirk fell off a moving platform and was rendered paraplegic.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The Plan refused to pay Odekirk's medical bills, citing to a provision of the Plan which excluded benefits for "work-related illness." Odekirk filed a claim in federal court pursuant to 29

U.S.C. § 1132 (a) (1) (B) of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA") against defendants to challenge the denial of benefits. The district court issued summary judgment for the plaintiff. Defendants now appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse.

We review determinations of whether the administration of a plan comports with ERISA de novo. Williams v. Caterpillar, Inc., 944 F.2d 658, 661 (9th Cir. 1991). In this case, the district court found that the Plan exclusion for "work-related illness" was ambiguous. The district court reasoned that , at first reading, the "work-related illness provision" appeared only to address double recovery for worker's compensation. The language was not explicit enough, therefore, to put a reasonable insured layperson on notice that he loses benefits when he performs any outside work for pay, no matter how slight. Because of this ambiguity, the district court construed the Plan is favor of the insured. Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 540 (9th Cir. 1990).

We disagree. The Plan excluded benefits for "work-related illness," which was defined to include "bodily injury" which "arises form or is sustained in the course of work for pay, profit or gain." ER tab 24, Exh. "F" at 8, 10, & 42. The language is unambiguous. Odekirk did sustain bodily injury in the course of work for pay. His injury, therefore, falls directly within the scope of uncovered expenses. Furthermore, "work-related illness" language did not address the problem of double recovery because a separate provision covered worker's compensation. Id. at 41. The language of the Plan was explicit enough to put an insured layperson on notice that he loses coverage when he performs outside work for pay.

Because the phrase "work-related illness" as explicitly defined is unambiguous, we need not reach the question of whether the district court erred in reviewing the Plan Administrator's interpretation of the Plan de novo rather than applying an abuse of discretion standard.

Reversed.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Roy L. Odekirk,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV-S-91-118-LDG (RJJ)
	)	
Imperial Palace, Inc. V.E.	)	
B.A. Trust Employee Medical	)	
Benefit Plan, et at.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the court on the parties' cross-motions for summary judgment (#24 & #27).

1. Facts

The following facts are undisputed. In 1989 the plaintiff, Roy Odekirk, was employed by the Imperial Palace as a stage-hand. As an employee, he was covered by the Imperial Palace's employee benefit plan ("the Plan"). In August of that year Odekirk agreed to do some free-lance photography work for a construction firm for $100. This work was unrelated to his employment at the Imperial Palace. While Odekirk was taking photographs from a moving platform, the platform collapsed and he was thrown onto a concrete bench, rendering him a paraplegic. Odekirk has incurred approximately $235,000 in medical expenses as a result of this injury.

The Plan insurance company has refused to pay any part of these expenses, relying on the following provision of Odekirks' policy:

Covered expense does not include

• • •

Expense for a work related illness
(emphasis in the original).

"Work related illness" is defined elsewhere in the policy as "an illness which arises from or is sustained in the course of work for pay, profit or gain (emphasis in the original). "Illness," also separately defined in the policy, includes "bodily injury or sickness." The Plan denied coverage on the grounds that Odekirks' injury was a "work-related illness" (as defined in the policy"), i.e. a "bodily injury" he sustained "in the course of work for pay, profit or gain." Under the Plan's theory, expenses arising out of that injury are excluded under the policy.

Odekirk argues that he should be able to recover from the Plan on three theories: 1) he argues that the plan exclusion is ambiguous and should be construed in favor of the insured, 2) he argues that the purpose of the exclusion clause in question is only to prevent double recovery and, since Odekirk is not entitled to workmen's compensation with respect to his injury, the exclusion does not apply, and 3) he argues that the Plan's interpretation of the exclusion clause is unreasonable and, consequently, unenforceable as against public policy.

The Plan argues that 1) the plan trustee's interpretation of the policy should be given deference, 2) the policy clearly and unambiguously excludes Odekirk's injury from coverage, 3) the purpose of the exclusion is not solely to prevent double recovery to persons already covered by workmen's compensation, since that contingency is dealt with in a separate policy exclusion, and 4) the Plan's interpretation of the policy is reasonable and not against public policy.

2. Law

There is no Nevada case law on point. The cases are split among most other jurisdictions on these issues. Some courts have held that exclusion clauses similar to the one at issue in this case are inherently ambiguous because they appear, at first reading, to be designed only to prevent double recovery (in cases where workmen's compensation is available). See Phillips v. Utah Local Government's Trust, 660 P.2d 249 (Utah 1983);

Carrol v. Union Labor Life Insurance Company, 65 Wash.2d 513, 398 P.2d 164 (1965). These courts have found that no reasonable insured in Odekirk's place could have anticipated from reading the exclusion clause that, as soon as the insured began engaging in "moonlighting" activity (however slight), all of his/her health benefits ceased with respect to injuries sustained as a result of that activity. Also see Segelstrom v. Blue Shield of Florida, Inc., 233 So.2d 645 (Fl.2d DCA 1970) and United Benefit Life Insurance Company of Omaha v. Glisson, 105 Ga.App. 122, 123 So.2d 350 (1961).

Other courts have found the same types of exclusion clauses unambiguous and have upheld the insurers' denial of coverage. See Kaczmarck v. Provident Life & Accident Insurance Company, 747 F.Supp. 516 (E.D. Ark. 1990); Brezan v. Prudential Insurance Company of America, 507 F.Supp. 962 (E.D. Pa. 1981); Sheperd v. Crown Life Insurance Company, 308 N.E.2d 672 (Ill. App. 1974). These courts have read similar policy provisions literally and found that, technically, they do exclude coverage to moonlighters who are injured while they are moonlighting.

None of these cases are binding on the court. Nevada courts generally construe ambiguous insurance policies in favor of the insured. See National Union Fire Ins. Co. of State of Pa., Inc. v. Reno's Executive Air, Inc., 100 Nev. 360, 682 P.2d 1380 (1984). The court finds that the insurance company probably designed the exclusion provision to apply to situations like Odekirk's, and not just to prevent double recovery. However, in the court's view the provision is ambiguous because it can only be understood to mean what the defendants say it means when it is closely parsed and viewed in the light of hindsight. It is not explicit enough to put a reasonable insured layman on notice that he/she loses insurance benefits whenever he/she does any outside work for pay, no matter how minor.

It should be remembered that the policy in this case is essentially an adhesion contract, written by the defendants in language of their own choosing. If the defendants had wanted

to make absolutely clear their intent, they could have done so. The court must presume that the drafters of the policy were aware of the line of cases finding exclusion clauses of this type ambiguous. The drafters of the policy could have chosen to make the exclusion much more clear, in light of these cases.

The court further finds that the defendants' interpretation of the exclusion leads to an unfair and unreasonable result, and therefore cannot, as a matter of public policy, be sustained. When an insurance policy has been issued which purportedly provides coverage but whose exclusionary provisions would narrow the coverage to defeat the purpose of the insurance, the policy must be construed against the insurer. National Union Fire Ins. Co. of State of Pa., Inc. v. Reno's Executive Air, Inc., 100 Nev. 360, 682 P.2d 1380 (1984). In this case the exclusion, as interpreted by the defendants, applies as soon as an insured begins performing any task, however small, for which he/she would be compensated. While it may be reasonable to expect an insured to obtain supplemental insurance if he/she enters into fairly regular supplemental employment, it is unreasonable to expect an insured to be aware that his/her insurance benefits need to be supplemented the moment he/she begins performing the smallest of odd jobs for pay. Therefore, the court finds 1) that the defendants' interpretation of the exclusion is not entitled to deference and 2) that the exclusion, as interpreted by the defendants in this case, is unreasonable and void as against public policy.

Accordingly, for the reasons above stated,

IT IS ORDERED that the defendant's motion for summary judgment (#24) is denied;

IT IS FURTHER ORDERED that plaintiff's cross-motion for summary judgment (#27) is granted as to the issue of liability on the insurance policy in this case.

Date: 17 June 1992

Lloyd D. George
United States District Judge

Illness Means:

(1) Bodily injury or sickness; or
(2) Pregnancy, childbirth, or a condition which arises from either; or
(3) Congenital defects or birth abnormalities, including premature birth

for which more than routine nursery care is required.

Mandated Continuation means the time span next following the date Medical or Dental Benefits would have ceased during which time such coverage may be continued as allowed by law.

of osteopathy, provides services which are covered by the *Plan;* and (2) Is practicing within the scope of his or her license.

Pre-existing Condition means an illness which is first sustained prior to the person's effective date of coverage and for which treatment or advice was given or expense was incurred within the 90 days preceding such effective date.

Prosthesis means any full or partial removable denture, crown or fixed bridge.

Time Effective. When any date is referred to, the effective time shall be 12:01 A.M. at the address of the *Plan* Administrator.

Totally Disabled and Total Disability mean being unable, because of illness:

(1) To work for pay, profit, or gain at any job for which one is suited by reason of education, training or experience; or

(2) To engage in one's regular and usual activities and not working at any job for pay, profit, or gain.

Item (1) applies to each person who is covered as *a full* time *employee.*
Item (2) applies to all other covered persons, if any.

Treatment Facility means a place certified as such by the Bureau of Alcohol and Drug Abuse in the Rehabilitation Division of the Department of Human Resources.

Work Related Illness means an *illness* which arises from or is sustained in the course of work for pay, profit, or gain.

Home health care includes: (1) Skilled nursing care and home health aide services; and (2) Any other services and supplies provided in lieu of the services which would have been covered under the Plan if the *covered person* was confined in a *hospital* or nursing *home*. Home health care does not include housekeeping or custodial care.

Covered Expense for licensed ambulance service is limited to expense incurred to transport a *covered* person to the nearest facility qualified to treat the illness of such person.

Covered Expense for a diabetes instruction program which is: (1) Designed to teach the patient and his or her family about the disease process and the daily management of diabetic therapy; and (2) Supervised by a *doctor.* Total payment for such Covered Expense will not exceed $100 per *calendar* year.

• Drugs or medicines which can be obtained only with a doctor's prescription.

• Oxygen.

• Artificial limbs or eyes, and other non-dental prosthetic devices.

• Rental or, on approval, the purchase of durable medical equipment which is designed and used only for the treatment of illness.

An expense is deemed to be incurred on the date the service is performed or the supply is obtained.

Covered Expense Does Not Include:

• Supplies or services for which no charge is made or for which the covered person is not required to pay.
• Supplies and services which the covered person is entitled to receive from the Uniformed Services Medical Care Facilities.

• Expense for which the covered person has or had a right to payment under: (1) A workers' compensation or similar law; or (2) A program of a government or plan established by law, except: (A) *Medicare;* (B) The Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); and (C) Where the law does not permit this type of exclusion.

• Expense for a *work related illness.*

• Expense for cosmetic surgery unless performed to repair: (1) A birth defect; or (2) Damage due to an accident which occurred while covered for these benefits, provided the expense is incurred while so covered, but no later than two years after the date of the accident.

• Expense for the services of a person who normally lives in your household, or who is the parent, spouse, child, brother or sister of you or your dependent.

Expense incurred while coverage is not in force, except as provided under the terms of the **Extension of Benefits During Disability** section.

• Expense for any of the services listed below unless, and except to the extent that, specific provisions dealing with such services are included in the *Plan.*